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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 1078

THE TRUST COMPANY OF CHICAGO, ADMINISTRATOR OF THE ESTATE OF ELIZABETH PALMER SMITH, DECEASED, ET AL.,

Petitioners,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

REPLY BY PETITIONERS TO DEFENSE "BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI."

This court recently in the case of *Department of Banking of the State of Nebraska* v. *Pink, Superintendent of Insurance of the State of New York,* 317 U. S. 264 at 266, has passed upon the exact point of jurisdiction which is sought to be raised at bar by the Respondents. You ruled against the contention now made by Respondents. In refusing to take jurisdiction you there discussed the basis for refusal of jurisdiction in the case of *Bunn* v. *City of Atlanta,* 19 S.E. (2d) 553, 317 U. S. 666 and rehearing denied 317 U. S. 711. In that case the Peti-

titioners did what the Respondents say should be done in this case. In that case the review before an intermediate Appellate Court was pursued before coming to this court. This court there calculated the three months from the date of the prior order of transfer by the Supreme Court of Georgia to the intermediate Court of Appeals of Georgia. You said it was too late to bring to this court the constitutional and federal questions, after the intermediate Court of Appeals had passed upon other phases of the case. In the case at bar as in that case the intermediate Court of Appeals had no jurisdiction to pass upon the federal questions that were presented to this court for review. As to federal jurisdiction you ruled that the order by the Supreme Court of Georgia declining to exercise jurisdiction and directing a transfer, is final for purposes of calculating the time to seek review before this court. Compare *Mattoon Steamboat Co.* v. *Murphy,* 63 S. Ct. 1126 at 1128, 318 U. S. .....

In the case cited by Respondents (*Prudential Insurance Co.* v. *Cheek,* 259 U. S. 540), there was a situation which does not exist in the record at bar. The Supreme Court of Missouri sits normally in two divisions. Only upon special motion is there a court *en banc.* In the *Prudential* case the record does not show that such a motion was made. This court has ruled that it has jurisdiction to review only from the court *en banc* in Missouri; *Osment* v. *Pitcairn, et al., Receivers,* 317 U. S. 587, 63 S. Ct. 21 denying certiorari for 159 S.W. (2d) 666. Consequently the order of transfer in that *Prudential* case made by one division of the Supreme Court of Missouri, was not a final order within the meaning of the federal statute, because it was not made by that court *en banc.* For that reason the language quoted by respondents from that opinion at page 2 of their brief may be correct statement under the Missouri Practice.

But in Illinois the Supreme Court is a unit. It never sits in divisions. It is the highest court in that State.

It seems to your petitioners that it is an additional breach of trust and is unconscionable misconduct, for the respondents who are trustees of these funds, to seek as they have to push around your petitioners from court to court, and wear out the litigation by a process of attrition and manufactured complexity. Your petitioners believe that it is a misuse of public funds for the respondents to use their powers and their prestige, to oppress citizens who must advance their own private funds in an effort to compel accounting for trusteeship, which there was duty voluntarily assumed by respondents, to have been performed by them willingly and promptly a long time ago.

By such dilatory means shown by the record and financed by public taxes, the respondents have lulled the courts in Illinois to evasion of the obligatory powers and duties of said courts, and to denial of the constitutional rights of your petitioners, as shown by the motion before the Supreme Court of Illinois (Tr. 65-78), and the statement of grounds relied upon in the petition (pages 3, 7 and 19-25). Unless the basic federal and constitutional questions are first determined, and issues of fact as to an accounting are made up by proper pleadings, how could the Appellate Court of Illinois (which has no power to pass upon such federal questions) perform any judicial duty to this record? That it could not and ought not be asked to do so, is clearly shown by the recent cases in Illinois, where the Supreme Court of that State performed its obligatory duty by deciding the questions over which it had exclusive power for review, and by its opinion remitted other questions in the case to the intermediate Appellate Court. It is also shown by decisions of the intermediate Appellate Court, after an order of transfer,

passing by and not deciding the federal and constitutional questions. *People ex rel. 1111 North LaSalle Corporation* v. *City of Chicago,* 316 Ill. App. 66 and 43 N. E. (2d) 691.

Unless the federal and constitutional questions are reviewed by this court at this time, the injustice of a procedural ambush will be accomplished, by the respondents against the petitioners.

It follows that the ruling by this court, in *Department of Banking of Nebraska* v. *Pink, etc.,* 317 U.S. 264 at 266 above cited, governs and sustains this petition for review. The order brought here for review by this record, is final so far as federal and constitutional questions are concerned. Petitioners have followed the latest announcement by this court. They confirm the showing made at pages 3 and 25 of their petition. Your Petitioners urge that the petition should be allowed and the writ should be granted.

Respectfully submitted,

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